Bank Muamalat Malaysia Bhd v Menteri Sumber Manusia, Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-449–11 OF 2016
TENGKU MAIMUN, VERNON ONG AND ZALEHA YUSOF JJCA
29 NOVEMBER 2018

Civil Procedure — Judicial review — High Court — Whether High Court rightly dismissed judicial review application — Whether applicant for judicial review failed to show Minister's decision suffered from illegality, irrationality or judicial impropriety — Whether affidavit evidence showed decision was made after consideration of investigation reports and all relevant matters under s 9 of the Industrial Relations Act 1967 ('the IRA') — Whether s 9 of the IRA did not require production of the investigation and other reports to the applicant or the court

The appellant, a member of the Malayan Commercial Banks Association, had accorded recognition to the fourth respondent ('the NUBE') to represent its employees in the non-clerical, general clerical and special grade clerical sectors. When the appellant promoted several of its general clerical staff to a newly-created post of customer relationship representative ('the CRR') — which caused them to cease being members of the NUBE and brought them under the appellant's in-house officers' union — the NUBE lodged a complaint over the matter with the second respondent ('the DGIR') under s 9(1A) of the Industrial Relations Act 1967 ('the IRA'). The DGIR investigated the complaint and submitted its report to the Minister concerned, who, pursuant to s 9(1D) of the IRA, ruled that the CRR were not employees under the managerial, executive, confidential or security capacities. The ruling effectively allowed the NUBE to represent the CRR. The High Court dismissed the appellant's application for judicial review of the Minister's decision holding that, inter alia, the Minister (and the DGIR) had taken all necessary steps as required under the IRA and that the Minister's decision did not suffer from any illegality, irrationality or procedural impropriety. In the instant appeal against the High Court's decision, the appellant argued that: (a) the Minister's ruling exceeded the terms of NUBE's complaint in that instead of confining itself to only the specific workers in respect of whom the complaint was lodged, the ruling covered the entire CRR category of workers; and (b) the Minister failed to justify the manner in which he came to his decision because he failed to produce the DGIR's report or the investigation report regarding NUBE's complaint.

Held, unanimously dismissing the appeal:

(1) The dispute in essence related to the question of whether the CRRs were employed in a managerial, executive, confidential or security capacity ('the excluded capacities'). The fact that some current CRRs were not formerly members of NUBE was irrelevant as the question of whether they were employed in the excluded capacities continued to determine whether or not they could be members of the NUBE. Section 9(1A) of the IRA did not require a dispute to be confined to workmen who were previously members of the trade union that had made the reference to the DGIR. It was couched such that any dispute as to 'whether any workman or workmen are employed in a managerial, executive, confidential or security capacity' might be referred to the DGIR. At any rate, the DGIR found no discernible difference in the job scope and functions between the promoted CRRs and the other CRRs; in other words, all CRRs performed and undertook the same tasks. Hence, the Minister had not asked himself the wrong question or committed any error or law; nor had he exceeded his jurisdiction under s 9(1D) of the IRA (see para 18).

(2) In the instant case, the Minister had stated the relevant facts which were placed before him when he came to his decision. The Minister and the DGIR filed separate affidavits setting out the particulars of the investigation process following receipt of NUBE's complaint letter. The DGIR had conducted meetings, interviewed the CRRs at various branch offices and obtained information on their job scope, roles and responsibilities. The results of the investigation were submitted to the Minister who, after considering the same, rendered his decision. It was apparent that the Minister only came to his decision after an examination of the relevant reports, negotiations between the parties, results of the DGIR's investigations, the law and other relevant matters. There was no requirement under s 9 of the IRA that obliged the Minister or the DGIR to disclose the investigation reports. The non-production of the DGIR's report was not fatal. Based on the comprehensive affidavits filed by the Minister and the DGIR, the Minister's decision was not impugned on the ground of procedural impropriety (see paras 20–22).

[Bahasa Malaysia summary

Perayu, seorang ahli Persatuan Bank-Bank Komersial Malaya, telah memberikan pengiktirafan kepada responden keempat ('NUBE') untuk mewakilik pekerja-pekerjanya dalam sektor-sektor bukan pengkeranian, pengkeranian am dan pengkeranian gred khas. Apabila perayu menaikkan pangkat beberapa staf pengkeranian am kepada jawatan baru direka iaitu wakil hubungan pelanggan ('WHP') — yang menyebabkan mereka bukan lagi ahli NUBE dan mereka jatuh di bawah persatuan pegawai dalaman perayu — NUBE telah membuat aduan berhubung perkara ini kepada responden kedua ('DGIR') di bawah s 9(1A) Akta Perhubungan Perusahaan 1967 ('APP'). DGIR telah menyiasat aduan itu dan mengemukakan laporannya kepada

Menteri yang berkenaan. Yang telah, menurut s 9(1D) APP, memutuskan bahawa WHP tersebut bukan pekerja di bawah kapasiti pengurusan, eksekutif, sulit atau keselamatan. Keputusan itu secara efektif membenarkan NUBE mewakili WHP tersebut. Mahkamah Tinggi menolak permohonan perayu untuk semakan kehakiman terhadap keputusan Menteri dengan memutuskan bahawa, antara lain, Menteri (dan DGIR) telah mengambil semua langkah yang perlu sebagaimana dikehendaki di bawah APP dan bahawa keputusan Menteri tidak mempunyai apa-apa yang menyalahi undang-undang, tidak rasional atau prosedur salah. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, perayu berhujah bahawa: (a) keputusan Menteri melebihi terma-terma aduan NUBE di mana ia tidak terbatas hanya kepada pekerja-pekerja spesifik berkenaan aduan yang dibuat, keputusan itu meliputi keseluruhan katagori pekerja WHP; dan (b) Menteri telah gagal menjustifikasikan cara beliau tiba kepada keputusannya kerana beliau gagal mengemukakan laporan DGIR atau laporan siasatan berkaitan aduan NUBE.

Diputuskan, sebulat suara menolak rayuan:

(1) Pertikaian pada dasarnya adalah berkaitan persoalan sama ada WHP tersebut telah diambil bekerja dalam kapasiti pengurusan, eksekutif, sulit atau keselamatan ('kapasiti yang dikecualikan'). Fakta bahawa beberapa EHP sedia ada bukan bekas ahli-ahli NUBE adalah tidak relevan kerana persoalan sama ada mereka diambil bekerja dalam kapasiti yang dikecualikan seterusnya menentukan sama ada atau tidak mereka boleh menjadi ahli-ahli NUBE. Seksyen 9(1A) APP tidak menghendaki suatu pertikaian dihadkan kepada pekerja yang sebelumnya ahli-ahli persatuan sekerja yang telah membuat rujukan kepada DGIR. Ia mengatakan bahawa apa-apa pertikaian berhubung 'whether any workman or workmen are employed in a managerial, executive, confidential or security capacity' boleh dirujuk kepada DGIR. Dalam apa keadaan, DGIR tidak mendapati apa-apa perbezaan yang ketara dalam skop pekerjaan dan fungsi antara WHP yang dinaikkan pangkat dan WHP lain; dalam kata lain, semua WHP telah melaksanakan dan menjalankan tugas yang sama. Justeru, Menteri tidak menoal dirinya persoalan yang salah atau melakukan apa-apa kesilapan atau undang-undang; mahu pun telah melampaui bidang kuasanya di bawah s 9(1D) APP (lihat perenggan 18).

(2) Dalam kes ini, Menteri telah menyatakan fakta relevan yang dikemukakan di hadapannya semasa beliau membuat keputusan. Menteri dan DGIR telah memfailkan afidavit berasingan yang menyatakan butiran proses siasatan berikutan penerimaan surat aduan NUBE. DGIR telah mengadakan mesyuarat, menemuduga WHP tersebut di beberapa pejabat cawangan dan memperoleh maklumat berhubung skop pekerjaan, tugas dan tanggungjawab mereka. Hasil siasatan itu telah dikemukakan kepada Menteri yang, setelah

mempertimbangkan yang sama, membuat keputusannya. Ia adalah jelas bahawa Menteri hanya tiba kepada keputusannya selepas pemeriksaan laporan berkenaan, rundingan antara pihak-pihak, hasil siasatan SGIR, undang-undang dan perkara-perkara relevan lain. Tiada keperluan di bawah s 9 APP yang mewajibkan Menteri atau DGIR mendedahkan laporan siasatan itu. Ia tidak memudaratkan jika laporan DGIR tidak dikemukakan. Berdasarkan afidavit-afidavit komprehensif yang difailkan oleh Menteri dan DGIR, keputusan Menteri tidak dipersoalkan atas alasan prosedur salah (lihat perenggan 20–22).]

Notes

For cases on High Court, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5974–5984.

Cases referred to

Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal [2014] 6 MLJ 377; [2014] 1 LNS 686, CA (refd)

Hasni Hassan & Ors v Menteri Sumber Manusia & Another [2017] MLJU 1799; [2013] 6 CLJ 74, CA (refd)

Hong Leong Bank Bhd v Menteri Sumber Manusia, Malaysia & Ors [2016] MLJU 1890, CA (refd)

Kesatuan Kebangsaan Pekerja-Pekerja Syarikat-Syarikat Pembuatan Keluaran Getah lwn YB Menteri Sumber Manusia dan satu lagi [2012] 9 MLJ 748, HC (refd)

Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351; [1990] 1 CLJ Rep 186, SC (refd)

Radha Krishnan a/l Kandiah v Menteri Sumber Manusia Malaysia & Anor [2010] 4 MLJ 713, HC (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

Legislation referred to

Industrial Relations Act 1967 ss 9, 9(1), (1A), (1B), (1C), (1D), (2), 33(1), (2)
Islamic Financial Services Act 2013
Printing Presses and Publications Act 1984 s 6(1)(a)
Trade Unions Act 1959

Appeal from: Application for Judicial Review No 25–249–08 of 2015 (High Court, Kuala Lumpur)

Sivabalah Nadarajah (Reena Enbasegaram with him) (Shearn Delamore & Co) for the appellant.
Ruzimah Mohd Radzuan (Shahmin Amizah Abu Bakar with her) (Public

Prosecutor, Attorney General's Chamber) for the first, second and third respondents.

Edmund Bon Tai Soon (Andrew Yong with him) (Amerbon) for the fourth respondent.

Vernon Ong JCA:

INTRODUCTION

[1] This appeal is against the decision of the High Court given on 2 November 2016 dismissing the appellant's application for judicial review of the Minister of Human Resources' decision dated 18 May 2015 which held that the employees of the appellant known as customer relationship representatives are not employed in a managerial, executive, confidential or security capacity.

SALIENT FACTS

[2] The appellant is a licensed bank under the Islamic Financial Services Act 2013 and a member of the Malayan Commercial Banks Association ('MCBA').

[3] The Minister of Human Resources, Malaysia ('Minister'), the Director General of Industrial Relations ('DGIR') and the Director General of Trade Unions ('DGTU') are the first, second and third respondents respectively. The fourth respondent (the National Union of Bank Employees ('NUBE')) is a trade union of bank employees registered under the Trade Unions Act 1959. Pursuant to a collective agreement dated 3 November 2015 between the MCBA and NUBE, NUBE was accorded recognition by the appellant to represent its employees in the non-clerical, general clerical and special grade clerical category.

[4] In 2009, the appellant created a category known as customer service representatives ('CRR') within the Executive Grade 12, which is a junior officer grade.

[5] From 2009 until 20 August 2015, there were 2,265 employees of the appellant who consisted of eligible non-clerical, clerical and special grade clerks, teller, and customer service representatives (Grades 17 and 18) who were selected to be promoted based on their performance for the position of CRR. There were about 23 successful applicants who rejected the promotion or did not want to attend the interview, and only 160 of the 2,265 employees concerned, were eventually promoted since 2009. As at the date of the appellant's application for leave to commence judicial review proceedings, there were 134 CRRs.

[6] The appellant's employees who are categorised as clerical, non-clerical and special grade are represented by NUBE. The appellant's employees who fall within the executive Grades 12, 11 and 10 including the CRRs, are represented by the appellant's in-house officers' union Kesatuan Pegawai-Pegawai Bank Muamalat Malaysia Bhd ('KEPAK').

[7] A dispute has arisen between the appellant and NUBE arising from the promotion of certain general clerical grade employees of the appellant, who were promoted and re-designated as CRRs. By a letter of complaint dated 18 December 2014, NUBE referred the dispute to the DGIR under s 9(1A) of the Industrial Relations Act 1967 ('the IRA 1967').

[8] The DGIR conducted enquiries and interviewed the CRRs under s 9(1B) of the IRA at the appellant's branches in Penang, Kelantan, Selangor, Kuala Lumpur and Johore. Subsequently, the DGIR notified the Minister of the dispute under s 9(1C) of the IRA.

[9] On 25 May 2015, the DGIR wrote to the appellant and NUBE enclosing the Minister's decision pursuant to s 9(1D) of the IRA whereby it was decided that the CRRs employed by the appellant are not employed in the managerial, executive, confidential or security capacity, as follows:

> Customer Relationship Representative adalah pekerja-pekerja yang digaji bukan dalam kapasiti pengurusan, Eksekutif, sulit atau keselamatan.

THE DISPUTE

[10] The essence of the dispute which was referred to the DGIR was NUBE's complaint that the appellant's promotion and redesignation of its clerical staff, who were members of NUBE to the post of CRR, prevented them from continuing as members of NUBE.

DECISION OF THE HIGH COURT

[11] In summary, the findings of the learned judge are as follows:

(a) the Minister was not required to limit his decision to the former employees of NUBE;

(b) the Minister was not required to refer the complaint to the DGTU;

(c) the Minister was not required to produce the DGIR's report;

(d) the promotion of the appellant's employees was contrary to the collective agreement between the appellant and NUBE and contrary to the spirit of the IRA 1967; and

(e) the Minister and the DGIR had taken all necessary steps as required by the IRA 1967 and the appellant had failed to show any illegality, irrationality or procedural impropriety.

SUBMISION OF PARTIES

[12] Before us, learned counsel for the appellant advanced two principal grounds. First, the Minister had acted beyond his jurisdiction in handing down his decision as his ruling exceeded the terms of NUBE's complaint. The Minister's decision under s 9(1A) of the IRA 1967 can only be in respect of the dispute raised by any of the parties, vis trade union of workmen or by an employer or by a trade union of employers. NUBE's only complaint was the issue of the capacity and scope of the appellant's tellers, ie, NUBE's former members, who had accepted the promotion to the position of CRRs, resulting in them coming out of NUBE's scope of representation. The issue was not whether or not all the CRRs came within the scope of NUBE's representation. In purporting to make a blanket ruling for the entire CRR category instead of confining itself to the issue raised in the trade dispute, the Minister had asked itself the wrong question and committed an error of law (*Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal* [2014] 6 MLJ 377; [2014] 1 LNS 686; *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748; *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351; [1990] 1 CLJ Rep 186).

[13] Second, learned counsel argued that despite the Minister's decision being challenged in a judicial review application the Minister failed to produce the DGIR report and investigation report upon which his decision was founded upon. The reviewing court must have before it all the material upon which the Minister's impugned decision had been premised upon. It is incumbent upon the Minister to justify the manner in which he came to his decision. In the absence of the same, the Minister's decision cannot be sustained (*Hong Leong Bank Bhd v Menteri Sumber Manusia, Malaysia & Ors* [2016] MLJU 1890).

[14] In reply, learned senior federal counsel appearing for the Minister, the DGIR and the DGTU argued firstly that the DGIR had conducted a thorough investigation pursuant to s 9(1B) of the IRA. The DGIR found that the CRRs were in fact performing clerical functions; the CRRs did not '(vi) Tidak membuat penilaian prestasi; (vii) Tidak mengambil tindakan disiplin; (viii) Tidak mengakses maklumat sulit seperti minit mesyuarat Pengurusan Kewangan Syarikat dan maklumat peribadi pekerja'. Further, the Minister's discretion under s 9(1D) of the IRA is wide, but not unlimited and, is based on his objective consideration of the referred dispute in the light of the DGIR's

report and finding of the DGIR. Secondly, *Hong Leong Bank* cited by the appellant is distinguishable as in that case the DGIR did not file any affidavit in reply whereas in this case, the DGIR filed an affidavit setting out the details of investigations he conducted and the findings. It was also argued that s 9(1D) of the IRA did not require the Minister to consider the DGIR's report.

[15] Learned counsel for NUBE advanced the following points in reply:

(a) there is nothing in s 9(1A) of the IRA 1967 that requires the complaint made by NUBE to be limited to its former members and that the DGIR was correct to investigate and the Minister was correct to make his decision in respect of the CRRs, who were all excluded from being members of NUBE, as a class. The fact that some current CRRs were not formerly members of NUBE is irrelevant, since the question of whether or not they are employed in an executive, management, security or confidential capacity continues to determine whether or not they can become members of NUBE and be represented by NUBE. There is no error of law as the Minister's decision pursuant to s 9(1D) relates back to s 9(1A) of the IRA 1967;

(b) this case is distinguishable from *Hong Leong Bank* where the Court of Appeal held that the failure of the DGIR to file a separate affidavit meant that there was no material before the High Court to confirm that the DGIR had acted in a reasonable manner. In this case, however, both the Minister and the DGIR had filed separate affidavits and explained the investigations process. Further, the Minister only made his decision after an examination of the relevant reports, negotiations between the parties, results of the DGIR's investigations, the law and other relevant factors. The investigations carried out by the DGIR were also comprehensive, whereby interviews were conducted with the CRRs in the appellant's branches in five states and meetings were conducted with the appellant. The Minister's failure to produce the investigation report was not fatal as there was no requirement under the relevant provisions which compels the Minister or the DGIR to disclose investigation reports (*Radha Krishnan a/l Kandiah v Menteri Sumber Manusia Malaysia & Anor* [2010] 4 MLJ 713; *Hasni Hassan & Ors v Menteri Sumber Manusia & Another* [2017] MLJU 1799; [2013] 6 CLJ 74 (CA); *Kesatuan Kebangsaan Pekerja-Pekerja Syarikat-Syarikat Pembuatan Keluaran Getah lwn YB Menteri Sumber Manusia dan satu lagi* [2012] 9 MLJ 748); and

(c) the appellant's argument that there was no relevant material before the High Court is without basis as the learned judge considered the affidavits filed by the Minister and the DGIR detailing the complaint, the meetings between the parties, the investigations conducted and the DGIR's findings. The learned judge correctly found that the Minister's decision

pursuant to s 9(1D) of the IRA 1967 had been properly and lawfully made following the Minister's consideration of the relevant issues relating to the dispute.

DECISION

[16] At the outset, it is pertinent to note that NUBE's membership is open to all employees of banks or financial institutions whose job contents consist of clerical functions, irrespective of their designation, but exclude those who are employed in a managerial, executive or confidential or security capacity ('excluded capacities'). The concept of excluded capacities is derived from s 9 of the IRA 1967 which deals primarily with the recognition of trade unions by employers for the purpose of collective bargaining. As such, s 9(1) of the IRA 1967 distinguishes between workmen employed in the excluded capacities and workmen employed in other capacities.

[17] A trade union, the majority of whose members are employed outside the excluded capacities may not seek recognition or serve an invitation to commence collective bargaining in respect of members employed in the excluded capacities. As a labour union, NUBE's functions are to negotiate wages and working conditions, to regulate relations between worker and employer, to take collective action to enforce the terms of collective bargaining, to raise new demands on behalf of its members and to help settle their grievances. In order to enable NUBE to perform its responsibilities, the size of its membership is important. The effectiveness of collective bargaining and effective dispute resolution between employers and employees is dependent upon the number of members of the union. In the light of the above mentioned it can be appreciated that NUBE lodged the complaint with the DGIR over the fact that CRRs falling under the excluded capacities would remain as or become ineligible to become NUBE's members thereby ultimately affecting their membership enrolment in the appellant as a whole.

[18] The appellant's first complaint relates to the contention that the Minister had exceeded the scope of his authority in ruling that CRRs are not employed in the excluded capacities. Although there is specific reference to 'jawatan juruwang' in NUBE's letter of complaint to the DGIR, we are of the view that the dispute in essence relates to the question of whether CRRs are employed in the a managerial, executive or confidential or security capacities. The fact that some current CRRs were not formerly members of NUBE is irrelevant as the question of whether they are employed in the excluded capacities continues to determine whether or not they can become members of NUBE. We do not think that s 9(1A) of the IRA 1967 requires a dispute to be confined to workmen who are or were previously members of the trade union that has made the reference to the DGIR. We say this because s 9(1A) of the

IRA 1967 is couched such that any dispute as to 'whether any workman or workmen are employed in a managerial, executive, confidential or security capacity' may be referred to the DGIR. At any rate, the job scope and functions of the CRRs are the same irrespective of whether or not the CRR was formerly a member of NUBE. This fact is consistent with the DGIR's finding that there is no discernible difference in the job scope and functions between promoted CRRs and other CRRs; in other words, all CRRs perform and undertake the same tasks. Accordingly, we do not think that the Minister had asked himself the wrong question or committed an error of law or had exceeded his jurisdiction under s 9(1D) of the IRA 1967. The cases cited by learned counsel for the appellant are of no aid to the appellant's argument and may be distinguished on the facts. *Ambank (M) Bhd v Menteri Sumber Manusia & Another and Another Appeal* relates to a claim by the Association of Bank Officers under s 9(2) of the IRA 1967 for recognition of a class of workmen specifically identified as those in 'Executive Scale E'. *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* was an appeal against the decision of the High Court quashing an award of the Industrial Court which turned on two issues, namely, as to the effect of ouster clauses in Acts of Parliament and secondly, as to the proper construction to be given to sub-s (1) and (2) of s 33 of the IRA 1967. *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* relates to an application for an order of *certiorari* to quash the decision of the Minister of Home Affairs, Malaysia refusing Aliran's application for a permit under s 6(1)(a) of the Printing Presses and Publications Act 1984.

[19] The second complaint relates to the non-production of the DGIR's report and investigation report. Learned counsel for the appellant relied on *Hong Leong Bank* where the Court of Appeal held that the failure of the DGIR to file a separate affidavit meant that there was no material before the High Court to determine whether the DGIR had acted in a reasonable manner. Further, the Minister therein made bare averments in his affidavits and failed to refer to the relevant materials he took into consideration in coming to his decision.

[20] In the instant case, however, the Minister had stated the relevant facts which were placed before him when coming to his decision. The Minister and the DGIR have filed separate affidavits setting out the particulars of the investigative process conducted following receipt of NUBE's complaint letter. There were at least two meetings organised by the DGIR which were attended by representatives of the appellant and NUBE. On 12 occasions between 4 March 2015 to 3 April 2015, the DGIR's officers had attended the appellant's branch offices and interviewed the CRRs in Selangor, Kuala Lumpur, Johore, Kelantan and Penang. In the course of their investigations, the DGIR obtained information on the job scope of the CRRs, roles and responsibilities. The results of the investigation were submitted to the Minister who after having

considered the same rendered his decision. Accordingly, it is apparent that the Minister only came about to his decision after an examination of the relevant reports, negotiations between the parties, results of the DGIR's investigations, the law and other relevant matters.

[21] In all the circumstances and as there is no requirement under s 9 of the IRA 1967 obliging the Minister or the DGIR to disclose the investigation report we do not think that the non-production of the DGIR's report is fatal.

[22] Lastly, we observe that the Minister's decision is not impugned on the ground of procedural impropriety; rather the point raised by the appellant was that there was no evidence before the High Court. For the reasons adumbrated above, we are of the view that the appellant's contention is clearly without merit as demonstrated by the comprehensive affidavits filed by the Minister and the DGIR. Accordingly, the appeal was dismissed with costs.

Appeal dismissed with costs.

Reported by Ashok Kumar